No. 5282

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. DEAN, as Trustee in Bankruptcy of the Estate of Robert E. Shephard (a bankrupt),

Appellant,

vs.

ROBERT E. SHEPHARD,

Appellee.

BRIEF FOR APPELLANT.

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I.

STATEMENT OF CASE.

This is an appeal from an order of Southern Division of the United States District Court for the Northern District of California, Bourquin, J., sustaining the Bankrupt's petition for review and reversing the Referee's order requiring the Bankrupt to turn over to the Trustee certain power machinery which the Bankrupt claimed as exempt.

The question involved is an interpretation of the Exemption Statute as found in Subdivision 4 of Section 690 of the Code of Civil Procedure of the State of California.

II.

SPECIFICATION OF ERRORS.

That the decree of the court made and entered is erroneous in reversing the Referee's turn-over order and granting the Bankrupt an exemption to certain *power machinery,* for the following reasons:

A. That said *power machinery* does not come within the purview of Subdivision 4 of Section 690 of the Code of Civil Procedure of the State of California, and therefore cannot be set aside as exempt.

B. That conceding that said power machinery *may* come within the limitations of the section of the Code, to-wit: *"Tools or Implements of a Mechanic or Artisan,"* the weight of evidence is that said power machinery was *not necessary* to carry on his trade.

III.

STATEMENT OF FACTS.

The facts are not in dispute.

The Bankrupt claims to be an automobile body and top maker. At the time of filing his petition in bankruptcy he had no one working for him, he normally employed two or three men, but during the period between June 1 and September 1, 1926, which the evidence showed to be the best months of his business history, he had four men working for him.

In his schedule, the Bankrupt listed certain tools, implements, *equipment and power machinery,* all of which he claimed as exempt. The Trustee made his report on exemptions and the Referee made his order (pp. 3-5):

1. Allowing *as exempt* all "tools or implements" to which the Bankrupt was unquestionably entitled and including,

(a) Blacksmith forge, anvil and hand tools;

(b) Hand tools and implements for acetylene welding;

(c) Hand wood working tools;

(d) Machinist's hand tools;

(e) Curtain and upholstery maker's tools, including a sewing machine (originally operated by foot power, and to which a small electric motor had been attached);

(f) A portable electric power drill.

Said "tools or implements" being sufficient to enable the Bankrupt to carry on five separate and distinct trades; and,

2. Denying Bankrupt's claim of *exemption* to certain *power machinery,* a general description of which is as follows (pp. 4-5):

1 36-inch band saw (power driven);
1 12-inch joiner (power driven);
1 ½-inch post drill (power driven);
1 Emery wheel (power driven).

Together with the electric motors and power transmission equipment, to-wit:

1 2-horsepower motor;
1 5-horsepower motor;
1 Countershaft, with 4 pulleys and 2 hangers;
1 3½-inch belt;
1 4-inch belt;
2 Wells Norris motor starting switches.

The Bankrupt petitioned the District Court for a review of that part of the Referee's order dealing with the *power machinery,* paragraph (2) above, and the District Court, on the hearing, reversed the said Referee's turn-over order and granted the Bankrupt's claim of exemption to said power machinery.

IV.

ARGUMENT.

A. THAT SAID POWER MACHINERY DOES NOT COME WITHIN THE PURVIEW OF THE EXEMPTION STATUTE.

1. Exemptions Determined by State Statutes.

In

Vought v. Kanne (C. C. A. 8th Cir.), 10 F. (2nd) 747,

the court said:

> "Exemptions in bankruptcy proceedings depend upon and are the same as those allowed by the governing state statutes as construed by the highest court of the state."

See also:

Ralph v. Cox (C. C. A. 8th Cir.), 1 F. (2nd) 435.

2. Exemption Statute of State of California.

Then, said *power machinery* to be exempt must come within the purview of Subdivision 4 of Section 690 of the Code of Civil Procedure of the State of California, which, taken with the introductory part of the provision of said law, reads as follows:

> "The following property is exempt from execution * * * 4. The tools or implements of

a mechanic or artisan, necessary to carry on his trade."

From a consideration of the statutes it is apparent that said *power machinery* must satisfy two qualifications in order to be exempt:

First, it must come within the limitation of *"tools or implements"* of a mechanic;

Second, it must be *necessary* to carry on his trade.

THE CLAUSE "TOOLS OR IMPLEMENTS" IS TOO LIMITED IN SCOPE TO EMBRACE POWER MACHINERY.

1. Limits of clause "tools or implements" as determined from texts and definitions:

Thompson on Homesteads and Exemptions, Section 755:

"Statutes exempting under various phraseology, the necessary tools of a debtor, by which he carries on his trade or occupation have never been held to embrace complicated and expensive machinery. The word 'tool' as used in such statutes, is understood to refer to some *simple instrument used by hand,* such as a saw, a plane, a trowel, and the like. The design of these statutes is said to be fulfilled by protecting mechanics and other laborers with the *usual implements necessary* in the exercise of their appropriate callings; and this benevolent design would be grossly perverted by extending it to large and expensive machines, or to separate machines, instruments and materials used in large manufacturing establishments, requiring the cooperation of many hands."

Freeman on Executions, Section 226, page 1212:

"That a machine may be exempt from execution as a tool or implement of the trade of the

debtor, must now be admitted. The difficulty is in formulating some test by which to determine when it is exempt and when not. The earlier cases incline to suggest the simplicity of its construction as such test. This is worthy of consideration but cannot be accepted as a final or conclusive test. Perhaps the capacity of the debtor to use it by his own personal strength or skill, without the aid or assistance of other machinery or motive power, is a better test. To illustrate: a typewriter or a sewing machine is by no means simple in its construction, but it may be used by an operative through the exercise of his personal strength and skill, and may be the one tool by which he carries on his trade or vocation, and earns his livelihood. If so, it is exempt from execution. The same rule is applicable to a lathe and its appliances necessary to enable the defendant to carry on his business as a mechanic, if it is run by *one-man power,* and is a tool ordinarily and necessarily used by mechanics and machinists in their trade." (Cites *Robb* case, 99 Cal. 202; 33 Pac. 890.)

25 *Cor. Jur.* 49:

"Tools are simple instruments used by hand and do not embrace extensive and complicated machines and appliances."

"To be exempt as a 'tool' the machine must be operated by hand and not by steam or water power, and even where statutes exempt 'tools and apparatus', tools have been construed to apply to simple instruments and apparatus and to machinery in some instances of considerable power and weight, but in both cases they must be *worked by hand or muscular power to be exempt.*"

18 *Cyc.* 1417:

" 'Tools', in its general received sense, has been stated to imply 'instruments of small value, and used with the direct application of *manual* strength'."

That the Circuit Court has approved the foregoing interpretation and limited the scope of the phrase "tools or implements" is shown in

Peyton v. Farmers National etc. Bank, 261 Fed. 326 (1919),

where the Circuit Court for the 5th Circuit, in deciding this case involving mill machinery *propelled by an electric motor,* said:

> "Machinery may not be set aside to a bankrupt as tools or apparatus of trade, where run by *other than hand."* (Cites *Thompson on Executions* and two Texas cases, (a) *Willis v. Norris,* 66 Tex. 628; (b) *Cullers v. Jones,* 66 Tex. 494.)

ONLY SUCH ARTICLES ARE EXEMPT AS WERE WITHIN THE INTENT OF THE LEGISLATURE AT THE TIME OF THE CREATION OF THE EXEMPTION STATUTE.

In

Conlin v. Traeger, 52 C. A. D. 1206, 258 Pac. 433,

decided by the District Court of Appeal on August 5, 1927, and a hearing denied by the Supreme Court, October 3, 1927, we find the following language:

> "While the statute should be liberally construed, it has been held that construction should not be indulged in to the extent of conferring privileges and benefits by construction which were *not intended to be conferred by the Legislature,* or to the extent of doing violence to the terms of the statute. So, where a specified article of personal property is made exempt, the courts are not authorized to extend the exemption by construction to *any other or different article.* Kennedy v. Hills (C. C. A.), 233 F. 666. As the automobile is an invention *which was not in use* when the statute was passed, it, of course, was

not mentioned therein, and was not within the *intent of the Legislature;* and as the Legislature has been in session many times since the automobile came into common use, and has not seen fit to include it in the statute as exempt from attachment or execution, when used by a physician in the practice of his profession, we must hold that it does not come within the provisions of the statute, and is therefore not exempt."

The above case also quoted from

Estate of Brown, 123 Cal. 399:

"Exemptions are the creations of statutes and exceptions to the general rule. No property is exempt *unless* made so by *express* provision of law. No assumed legislative policy can justify the courts in adding to the statutory list of exemptions. Legislators are presumed to understand the force and effect of the language which is used and to have contemplated all circumstances which would make it desirable that *other property not in the list of exemptions* should be added thereto. * * * And, besides, we do not expect to find in such a statute negative words, for nothing is exempt save *what is expressly made so,* and when a statute gives a list of exempt property it expressly provides that *no other property is exempt.* To construe an unambiguous statute is an attempt to defeat the expressed legislative will and not to ascertain it. * * * It is said that the statute is remedial and should be liberally construed to effect the purpose of the Legislature. That is so; but that is not a liberal construction, which defeats the plainly expressed purpose of the Legislature."

The *Conlin* case also quoted from other authorities, in

Stanton v. French, 91 Cal. 276:

"In the list of property allowed peddlers by statute as exempt from execution, we find no

> article answering in name or use to a breadbox, and a *debtor's claims are limited by the words of the statute.* (Italics ours.)"

In

Crown Laundry etc. Co. v. Cameron, 39 Cal. App. 617, 179 Pac. 525,

the court said:

> "Clearly it appears to us that a motor driven vehicle is not a cart, wagon, dray, truck, coupe, hack, or carriage, as those terms are used in the section * * * If the Legislature intended that a motor vehicle should be exempt from attachment, we think that it would have so declared in plain terms. For the courts to add to the statute any articles not enumerated would in effect be *judicial legislation.*"

The same question was raised in

In re Wilder (D. C.), 221 Fed. 476.

There the bankrupt claimed as exempt under Section 690 of the Code of Civil Procedure a taxicab automobile. The court, Dooling, D. J., says:

> "This taxicab does not fall within the *literal* terms of the section and while those provisions are to be construed liberally, yet the court is not warranted in *creating by interpretation* new exemptions. The Legislature of this state has been in session several times since taxicabs have been in very general use, and might well have included them in the exempt list. As the Legislature has not done so, I do not feel warranted in doing so by an interpretation of the language of the section which at the best would be a forced one."

AT THE TIME SUBDIVISION 4 OF SECTION 690 WAS ENACTED, IT WAS NOT WITHIN THE INTENT OF THE LEGISLATURE TO EXEMPT POWER MACHINERY, ELECTRIC MOTORS, TRANSMISSION MACHINERY, ETC.

We find in the Compiled Laws of California, 1850-1853, as much of Subdivision 4 of Section 690, therein called Subdivision 4 of Section 219, as we are here concerned with.

It is of general knowledge that electric motors and power machinery have been developed well within the past forty years. Francis B. Crocker, professor of electrical engineering at Columbia University, in his book, "Electric Motors", at page 2, says that it was not until after 1887, when the Central Stations and Power Companies had developed their electric power distribution systems to the point where they became sufficiently large and well regulated that the use of the electric motor was encouraged. This court can take judicial notice that seventy-five years ago, and a long time prior to the invention, practical application or general use of electric motors and power machinery, that it was *not the intent of the Legislature* to exempt said motors and power machinery of which it knew nothing.

Further, that the Legislature fully appreciated the narrow scope, effect, interpretation and limits of the phrase "tools or implements" is shown by the wording of Subdivision 17 of Section 690 which was added in 1899 and which reads:

> "The following property is exempt from execution * * * 17. *All machinery,* tools and implements, necessary in and for boring, sinking, putting down and constructing surface or artesian wells; also the *engines* necessary for operating

> such machinery, implements, tools, etc., also all *trucks* necessary for the transportation of such machinery, tools, implements, engines, etc.; provided, that the value of all the articles exempted under this subdivision shall not exceed one thousand dollars."

It will be noted, first, that the word *machinery* has been added to the phrase "tools and implements"; second, that the Legislature realized that even the new term machinery, which they had added, did not include the means of propelling said machinery, the motive power, the engines, etc., as they specifically added the phrase "also the engines necessary for operating said machinery, implements, tools, etc."; and, third, the Legislature further placed a limitation of one thousand dollars on the articles which might thereunder be claimed as exempt.

As the learned Referee has very clearly stated (p. 15, Transcript):

> "Manifestly, in the legislative mind, there was a clear-cut distinction between the meaning of the words *'machinery'* and *'tools and implements'*.
>
> "This being so, it necessarily follows that had the Legislature intended that the *'machinery'* of a 'mechanic' or 'artisan' should come within the purview of the particular subdivision of the section herein involved, it would have so declared in no uncertain terms, and having failed to do so, the word or words necessary to give the broad construction here contended for by the Bankrupt should not be imported into the statute."

THE SUPREME COURT OF CALIFORNIA HAS CONSIDERED ONLY TWO "MACHINERY CASES" UNDER SUBDIVISION 4 OF SECTION 690, IN ONE, A MANUALLY OPERATED TOOL WAS HELD TO BE EXEMPT, AND IN THE OTHER, POWER OPERATED MACHINERY WAS HELD NOT TO BE EXEMPT.

In re Robb, 99 Cal. 202 (1893),

a case involving a *manually operated* machinists' lathe, the court said:

> "The implement in question, according to the testimony of the claimant, was necessary to carry on his business as a mechanic and machinist, and is a tool used for shaping wood or metal, cost about $250, *was run by man power,*—one man easily turning it,—and was a tool ordinarily and necessarily used by mechanics and machinists in their trade."

and affirmed the order setting said tool aside as exempt.

In the second case, however, the court not only denied exemption of *power operated machinery,* but also of other tools or implements which the court found *were not necessary:*

In re Mitchell, 102 Cal. 534 (1894),

where the court said:

> "The sole question then is, *was the property exempt from execution?* The property consisted of four printing presses, a miscellaneous assortment of type, a paper-cutting machine, chases, rules, leads and the general paraphernalia of a printing office. Three of the presses were *operated by steam,* and the machinery was run by shafts, belts, and pulleys. There was also an iron safe, which cost $100, and the total cost of the plant was $3500. Mitchell was not himself a practical printer, typesetter, pressman or machinist, but he was the manager of the printing establishment, and employed a foreman, and

sometimes a dozen typesetters and machinists, the number depending upon the amount of work on hand. He testified that 'every bit of the material, machinery, type, etc., which I sold * * * was absolutely necessary to the business which I was carrying on'. On the other hand, N. C. Hawks testified that he had been a practical printer for 18 years, and that a printer could get along and make a living with one press and $500 or $600 worth of type. The statute declares that 'the tools or implements of a mechanic or artisan necessary to carry on his trade' are exempt from execution. Code Civ. Proc., Section 690, Subd. 4. *Conceding* that Mitchell was a mechanic or artisan, within the meaning of this section, and that the *printing presses operated by steam, paper-cutting machine,* etc., *may* be regarded as the tools or implements of a printer, still the statute exempted *only* such tools or implements as were *necessary* to carry on his trade, and *not all* that he may have acquired and used in his business."

The jury found that none of the machinery, tools or implements were exempt, and the court held that they could not disturb the verdict for want of evidence to support it.

ASSUMING, FOR ARGUMENT, THAT SAID POWER MACHINERY MAY COME WITHIN THE LIMITATION OF "TOOLS OR IMPLEMENTS", STILL IN ORDER TO BE EXEMPT, IT MUST BE "NECESSARY TO CARRY ON HIS TRADE".

The court, with reference to the various provisions of Section 690, said:

Estate of Millington, 63 Cal. App. 498:

"There appears therein a general purpose to limit the various articles exempted, either by number or value or by the word 'necessary' or other equivalent expression."

It will be recalled that the *Mitchell* case, above quoted, clearly stated that even "tools or implements" and only those "necessary to carry on his trade and not all that he may have acquired and used in his business" are exempt.

SUMMARY OF THE EVIDENCE WHICH SUPPORTS THE RULING THAT SAID POWER MACHINERY WAS NOT NECESSARY TO CARRY ON HIS TRADE.

From the agreed statement of facts (pp. 8-11, Transcript) we find "that a journeyman auto body mechanic, when working for another, is not required to furnish such band saw, joiner, drill or emery wheel, but that the same are usually furnished by the establishment for which he works".

The job record introduced in evidence showed that the jobs performed during the months of June, July, and August, 1926, the best months of the Bankrupt's business history, were those of repairing side curtains, putting in new celluloids, repairing fenders, straightening fenders, etc., jobs which both the Bankrupt and his expert witness, who had been employed by the Bankrupt for some time and who was familiar with the work performed in the shop, testified *did not require the use of the power machinery* with which we are here concerned. Further, the Bankrupt was unable to pick out more than one job performed in the three-month period which would require the use of the power machinery, and even as to that job it was not shown that said power machinery was necessary.

CONCLUSION.

Referring to the memo opinion and order of the learned District Judge Bourquin, wherein he says:

> "There is nothing in this remedial statute limiting the mechanic to hand tools, denying to him the benefit of development and improvement in his craft."

we infer from his language that he appreciated that said power machinery did not come squarely within the limitation of "tools or implements", but that, notwithstanding that fact, he felt that the Bankrupt should still be entitled to the benefits of the development and improvement of the tools of his craft. Be that as it may, still, we feel that is a matter for legislative consideration, and a grant of exemption by them, rather than a case where the original intent of the Legislature should be enlarged or extended by judicial decision.

As we have seen, the highest court of our state has declined to give a physician in *Conlin v. Traeger,* supra; or a baker in *Stanton v. French,* supra; or a laundryman in *Crown etc. Co. v. Cameron,* supra; or a hackman in *In re Wilder,* supra, the benefit of the improvement of science, invention and mechanical progress, and substitute an automobile, and it will be conceded by all that the automobile is now as necessary to enable each to make a livelihood as was the horse and wagon which the automobile has replaced, then, by the same token, we feel that the original legislative intent to exempt *only manually operated tools or implements* should not be enlarged, by judicial legislation, to give a mechanic or artisan the benefit

of science, invention and mechanical progress, and grant an exemption of *power operated modern machinery,* which the Legislature, at the time it enacted the exemption statute in 1850, could not have had in mind nor *intended* to exempt.

It is respectfully but earnestly submitted that upon the facts and under the law, the judgment of the District Court should be reversed, and the Referee's turn-over order affirmed.

Dated, Oakland,
February 20, 1928.

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